

IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE

February 13, 2008 Session

WILLARD FREDERICK WILLIAMS v. NOELLE LESLEY WILLIAMS

Appeal from the Circuit Court for Bradley County
No. V-01-745 Lawrence H. Puckett, Judge

No. E2007-01747-COA-R3-CV - FILED APRIL 30, 2008

In this divorce case, the husband raises two issues: (1) whether the trial court erred in classifying as marital property an annuity purchased during the marriage with the husband's separate funds when the annuity listed the wife as the owner, and (2) whether the trial court erred by ordering him to pay an excessive amount of alimony. The wife argues that the trial court's alimony award was insufficient and that the trial court erred by awarding each party one-half of the annuity's value instead of the entire amount to her. We find no abuse of the trial court's discretion in its alimony award, its classification of the annuity as marital property, and its division of the marital estate, and consequently, we affirm the judgment of the trial court. We remand the case for the trial court to determine and award the wife a reasonable attorney's fee on appeal because of the wife's financial need and other equitable factors.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed;
Case Remanded

SHARON G. LEE, J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., and D. MICHAEL SWINEY, J., joined.

D. Mitchell Bryant, Cleveland, Tennessee, for the Appellant, Willard Frederick Williams.

Eric S. Armstrong, Cleveland, Tennessee, for the Appellee, Noelle Lesley Williams.

OPINION

I. Background

Willard Frederick Williams and Noelle Lesley Williams were married in October of 1989. No children were born to their marriage. At the time of marriage, Ms. Williams had been diagnosed with muscular sclerosis, a debilitating disease which grew progressively worse for her during the marriage. Within two or three years after the parties were married, Ms. Williams was diagnosed as

being totally disabled with muscular sclerosis. The parties' relationship also apparently deteriorated with the passage of time, and in August of 2001, Mr. Williams filed for divorce. It appears Mr. Williams moved out of the marital residence around the time he filed for divorce.

The parties' marital residence, located on East Circle Drive in Cleveland, Tennessee (the "East Circle Drive house"), was purchased in 1993. Because the East Circle Drive house had three levels and was inaccessible for Ms. Williams, in March of 2003 she moved into a separate one-level house (the "Grove Avenue house") purchased by Mr. Williams. Ms. Williams lived in the Grove Avenue house, and Mr. Williams moved back into the East Circle Drive house during the parties' extended period of separation prior to the final divorce decree.

Ms. Williams requested that the trial court grant her a legal separation instead of a divorce because she had been insured under Mr. Williams's health insurance policy and was concerned she would lose access to health insurance if she was no longer his spouse. On April 10, 2003, following a hearing three days earlier, the trial court ordered Mr. Williams to pay alimony pendente lite in the amount of \$780 per month, and took all other matters under advisement. The record contains three subsequent orders of the trial court finding Mr. Williams to be in contempt for failing to pay this alimony.

A second hearing took place on May 6, 2004, after which the trial court entered an order granting Ms. Williams a legal separation, ordering Mr. Williams to "continue to pay alimony *in futuro* in the amount of \$780.00," and ruling that issues relating to property division would be addressed later. The third and final hearing took place on April 16, 2007, after which the trial court entered a final decree declaring the parties divorced, dividing the marital estate, and awarding Ms. Williams alimony *in futuro*. The trial court awarded the East Circle Drive house to Mr. Williams, and granted Ms. Williams a life estate in the Grove Avenue house, with the remainder interest to Mr. Williams. Regarding the largest asset other than the real property, an annuity purchased from Allianz Life Insurance Company (the "Allianz annuity") valued at approximately \$75,000, the trial court classified it as marital property and ordered the parties to liquidate it and divide the proceeds equally. The trial court awarded Ms. Williams alimony *in futuro* in the amount of \$780 per month plus the monthly mortgage payments, taxes, insurance and utility expenses for the Grove Avenue house. The trial court also ordered Mr. Williams to pay \$1,500 in Ms. Williams's attorney's fees.

II. Issues Presented

Mr. Williams appeals, raising the following issues:

1. Whether the trial court erred in classifying the Allianz annuity as marital property and awarding Ms. Williams one-half of its value.
2. Whether the trial court erred in ordering him to pay an excessive amount of alimony.

Ms. Williams argues in response that the trial court erred by not awarding her the entire value of the Allianz annuity, and that the trial court awarded her an insufficient amount of alimony. Additionally, Ms. Williams requests an award of her attorney's fees associated with this appeal.

III. Analysis

A. Standard of Review

Our standard of review was recently stated by the Supreme Court in ***Keyt v. Keyt***, 244 S.W.3d 321 (Tenn. 2007), wherein the Court addressed similar issues of property classification and division in a divorce proceeding:

This Court gives great weight to the decisions of the trial court in dividing marital assets and “we are disinclined to disturb the trial court’s decision unless the distribution lacks proper evidentiary support or results in some error of law or misapplication of statutory requirements and procedures.” ***Herrera v. Herrera***, 944 S.W.2d 379, 389 (Tenn. Ct. App. 1996). As such, when dealing with the trial court’s findings of fact, we review the record de novo with a presumption of correctness, and we must honor those findings unless there is evidence which preponderates to the contrary. Tenn. R. App. P. 13(d); ***Union Carbide Corp. v. Huddleston***, 854 S.W.2d 87, 91 (Tenn. 1993). Because trial courts are in a far better position than this Court to observe the demeanor of the witnesses, the weight, faith, and credit to be given witnesses’ testimony lies in the first instance with the trial court. ***Roberts v. Roberts***, 827 S.W.2d 788, 795 (Tenn. Ct. App. 1991). Consequently, where issues of credibility and weight of testimony are involved, this Court will accord considerable deference to the trial court’s factual findings. ***In re M.L.P.***, 228 S.W.3d 139, 143 (Tenn. Ct. App. 2007) (citing ***Seals v. England/Corsair Upholstery Mfg. Co.***, 984 S.W.2d 912, 915 (Tenn. 1999)). The trial court’s conclusions of law, however, are accorded no presumption of correctness. ***Langschmidt v. Langschmidt***, 81 S.W.3d 741, 744-45 (Tenn. 2002).

Keyt, 244 S.W.3d at 327 (footnote omitted).

Regarding an award of spousal support, this court has declared on numerous occasions that a trial court has broad discretion in determining the type, amount, and duration of alimony, based upon the particular facts of each case. ***Mimms v. Mimms***, 234 S.W.3d 634, 637 (Tenn. Ct. App. 2007); ***Wood v. Wood***, No. M2003-00193-COA-R3-CV, 2004 WL 3008875, at *4 (Tenn. Ct. App.

M.S., filed Dec. 28, 2004) and cases cited therein; *Bratton v. Bratton*, 136 S.W.3d 595, 605 (Tenn. 2004). As an appellate court, we are disinclined to second guess a trial court’s alimony decision unless it is not supported by the evidence or is contrary to public policies reflected in the applicable statutes. *Nelson v. Nelson*, 106 S.W.3d 20, 23 (Tenn. Ct. App. 2002).

B. Classification of the Allianz Annuity as Marital Property

We first address Mr. Williams’s argument that the trial court should have classified the Allianz annuity as his separate property. After the trial court has identified all property interests at issue in a divorce proceeding, the next step is to classify the property as either marital or separate. *Keyt*, 244 S.W.2d at 328; *Flannary v. Flannary*, 121 S.W.3d 647, 650 (Tenn. 2003). This classification is an important threshold matter because courts do not have the authority to make a distribution of separate property. *Id.* The classification of property at issue as either marital or separate is governed by statute, Tenn. Code Ann. § 36-4-121, which defines “marital property” to include the following:

(1)(A) [A]ll real and personal property, both tangible and intangible, acquired by either or both spouses during the course of the marriage up to the date of the final divorce hearing and owned by either or both spouses as of the date of filing of a complaint for divorce

(B) [I]ncome from, and any increase in value during the marriage of, property determined to be separate property in accordance with subdivision (b)(2) if each party substantially contributed to its preservation and appreciation, and the value of vested and unvested pension, vested and unvested stock option rights, retirement or other fringe benefit rights relating to employment that accrued during the period of the marriage.

Tenn. Code Ann. § 36-4-121(b)(1)(A), (B). “Separate property,” on the other hand, is exclusively owned by the husband or the wife and is defined by statute as follows:

(2)(A) All real and personal property owned by a spouse before marriage . . . ;

(B) Property acquired in exchange for property acquired before the marriage;

(C) Income from and appreciation of property owned by a spouse before marriage except when characterized as marital property under subdivision (b)(1);

(D) Property acquired by a spouse at any time by gift, bequest, devise or descent

Tenn. Code Ann. § 36-4-121(b)(2)(A)-(D). The classification of property as either marital or separate is a factual question, *Woodward v. Woodward*, 240 S.W.3d 825, 828 (Tenn. Ct. App. 2007); *Current v. Current*, No. M2004-02678-COA-R3-CV, 2006 WL 656791, at *1 (Tenn. Ct. App. M.S., Mar. 15, 2006), and, in accordance with Tenn. R. App. P. 13(d), a trial court's decision in that regard will not be disturbed unless the evidence preponderates to the contrary.

The Allianz annuity was purchased in May of 2001 at a cost of \$56,700. The funds used to purchase the annuity came from Mr. Williams's inheritance from his mother, which was his separate property pursuant to Tenn. Code Ann. § 36-4-121(b)(2)(D). The application for the annuity listed Mr. Williams as the annuitant and Ms. Williams as the owner. On two places in the application, Mr. Williams is described by a handwritten addition as being the "joint owner." The application for the annuity specifically states in several places that the annuity will take the place of life insurance previously obtained by the parties and covering both Mr. and Ms. Williams. The annuity contract states: "prepared especially for Willard & Noelle Williams."

Additionally, Mr. Williams testified as follows regarding his intentions in purchasing the Allianz annuity:

Q: Now, over here on the first page of this document that you signed, it says owner. Noelle Williams is identified as the owner of this annuity, isn't she?

A: It was in a trust for – it was set up in a trust fund *for both of us having ownership* for the trust.

* * *

Q: What other reason other than Ms. Williams' health condition, which I guess was pretty grave at that particular point in time, would you have created that annuity for?

A: I would have done the same thing regardless if she had MS or not. It was created for us in our old age if we stayed together and we lived with each other.

Q: Well, she had MS, had been diagnosed with MS several years before you created this.

A: I knew she had MS, yes.

Q: So wouldn't you agree with me the reason you created this was for her benefit because of her health condition?

A: Not totally. It was to look after both of us or whichever one preceded each other in death.

The foregoing evidence supports the conclusion that the Allianz annuity was properly classified as marital property because of the operation of the doctrine of transmutation, one of the means by which separate property is converted into marital property under Tennessee law. Transmutation occurs “when separate property is treated in such a way as to give evidence of an intention that it become marital property.” *Langschmidt v. Langschmidt*, 81 S.W.3d 741, 747 (Tenn. 2002). Both the testimony of Mr. Williams and the written contents of the annuity application support the notion that Mr. Williams intended that the Allianz annuity be jointly-owned marital property when he purchased it.

Mr. Williams further argues in his appellate brief that Ms. Williams “apparently transferred any record interest she had in this annuity” to Mr. Williams in the spring of 2002. Mr. Williams testified as follows regarding his assertion that Ms. Williams “signed over” her interest in the annuity after he had filed for divorce:

Q: Mr. Williams, with regard to this major asset that’s left, this Allianz account, it was set up in the Willard F. Williams and Noelle L. Williams revocable living trust.

A: Yes, it was.

Q: And it looks as if at some point in time, for whatever reason, Mrs. Williams signed that over?

A: Yes, she did.

Q: Do you know why that happened? That was back in May of ‘02.

A: This was when I was – we had gone through arbitration to set on the house and payments. She realized as part of my assets and part of my inheritance I needed that to go against a loan to purchase the house after I paid off East Circle.

* * *

Q: Go ahead, Mr. Williams.

A: It was put into a trust for both of us from my mother’s inheritance. I was trying to look after both of us at the time we were together. When we split, she signed it back over to me.

Q: But you were always a joint owner on that or an annuitant –

A: We were both beneficiaries into the trust that it was under.

The record contains no further evidence regarding the alleged transfer of Ms. Williams's interest in the Allianz annuity. Although counsel for the parties made reference to a document in which Ms. Williams purportedly took such an action, the document was not introduced into evidence or considered by the trial court. Ms. Williams was not questioned about her alleged transfer at any of the three hearings. Although the transfer was alleged to have taken place in April or May of 2002, the first time any evidence of it was brought to the trial court's attention was at the April 16, 2007 hearing; no mention of the alleged transfer was made at the hearings of April 2003 and May 2004, although Mr. Williams did generally discuss the Allianz annuity in his testimony at the earlier hearings. The trial court did not specifically address Mr. Williams's argument that Ms. Williams transferred her interest in the annuity to him after he filed for divorce, but its holding that the annuity was marital property makes it obvious that the court did not find this argument persuasive. We hold that the evidence does not preponderate against the trial court's classification of the Allianz annuity as marital property. We further find that the trial court's decision to award each party one-half of the value of the annuity is a reasonable and equitable one, when considered in light of the overall property division ordered by the trial court and the facts and circumstances of this case; consequently, Ms. Williams's request to modify the trial court's decision by awarding her the total value of the annuity is denied.

C. Spousal Support

We next consider the trial court's award of alimony *in futuro* to Ms. Williams in the amount of \$780 per month plus the monthly mortgage payments, taxes, insurance and utility expenses for the Grove Avenue house. A trial court is required to consider the following statutory factors in making an alimony award:

- (1) The relative earning capacity, obligations, needs, and financial resources of each party, including income from pension, profit sharing or retirement plans and all other sources;
- (2) The relative education and training of each party, the ability and opportunity of each party to secure such education and training, and the necessity of a party to secure further education and training to improve such party's earnings capacity to a reasonable level;
- (3) The duration of the marriage;
- (4) The age and mental condition of each party;
- (5) The physical condition of each party, including, but not limited to, physical disability or incapacity due to a chronic debilitating disease;
- (6) The extent to which it would be undesirable for a party to seek employment outside the home, because such party will be custodian of a minor child of the marriage;

- (7) The separate assets of each party, both real and personal, tangible and intangible;
- (8) The provisions made with regard to the marital property, as defined in § 36-4-121;
- (9) The standard of living of the parties established during the marriage;
- (10) The extent to which each party has made such tangible and intangible contributions to the marriage as monetary and homemaker contributions, and tangible and intangible contributions by a party to the education, training or increased earning power of the other party;
- (11) The relative fault of the parties, in cases where the court, in its discretion, deems it appropriate to do so; and
- (12) Such other factors, including the tax consequences to each party, as are necessary to consider the equities between the parties.

Tenn. Code Ann. § 36-5-121(i). While a trial court should consider each of the above factors relevant under the circumstances, the two most important factors to be considered in awarding spousal support are need of the disadvantaged spouse and the obligor spouse's ability to pay. *Stinson v. Stinson*, 161 S.W.3d 438, 441 (Tenn. Ct. App. 2004); *Burlew v. Burlew*, 40 S.W.3d 465, 470 (Tenn. 2001).

Mr. Williams does not dispute Ms. Williams's need for spousal support. Ms. Williams has been totally disabled from muscular sclerosis since early in the parties' marriage, and her condition has gotten worse over time. Ms. Williams presented a letter written in October of 2003 from her treating physician of many years opining that "she is completely unable to take care of herself and should have 24-hour assistance." Although Ms. Williams has been unable to afford 24-hour assistance, her largest expense has been paying for a part-time caregiver who works at an hourly wage helping her on workdays from Monday to Friday. Ms. Williams's latest affidavit of income and expenses shows an income of \$984 per month from social security and \$780 in alimony, for a total of \$1764 per month. Her monthly expenses, which do not include an expense for house payment, utilities, clothing, or insurance of any kind other than for her vehicle that is occasionally driven by her caregiver, total \$2,148.85, resulting in a monthly deficit of \$384.85.

Mr. Williams's argument on appeal centers around his assertion that the alimony award was in excess of his ability to pay. Mr. Williams's most recent income and expense statement, filed at the April 16, 2007 hearing, shows a total net monthly income of \$3,200 and total monthly expenses (including alimony of \$780 per month and mortgage and utility payments on both the Grove Avenue and East Circle Drive houses) of \$3,365, resulting in a deficit of \$165 monthly. Mr. Williams testified that the monthly mortgage expense on the Grove Avenue house had increased from \$621 in 2003 to \$910 in 2007 because he refinanced and borrowed more money against the house. Mr. Williams further testified in 2007 that he had been able to replace the cabinets at his East Circle

Drive residence at an expense of \$5,000. We are of the opinion that the record supports the conclusion that Mr. Williams has access to at least two sources of potential further income: (1) more employment hours, because Mr. Williams by his own testimony has worked approximately half of a forty-hour workweek at all times pertinent to this case, and (2) sharing of income and expenses with the woman who has shared his household since apparently shortly after the parties' separation.

Mr. Williams has worked for the United States Postal Service from 1996 through the last hearing in 2007. He testified that he worked part-time, with flexible hours depending on need and volume of mail. At the 2004 hearing, Mr. Williams testified that he was working basically half of what would be considered "full-time." At the 2007 hearing, Mr. Williams testified that his weekly hours were "anywhere from 17 maybe up to 30, 38." Mr. Williams, who was 59 years old in 2007, testified on several occasions that there was no reason he could not work more hours if they were available to him.

The parties had been married for approximately twelve years when Mr. Williams filed for divorce. Ms. Williams testified that she discovered her husband was filing for divorce when one day he told her "he just wasn't happy and so he was leaving." At the hearing in April of 2003, Mr. Williams admitted that he was living with a Deborah Porter, whom he described as a "roommate" who cleaned the house in return for room and board. At that time, Mr. Williams denied having a romantic relationship with Ms. Porter. Mr. Williams and Ms. Porter were still living together four years later at the time of the 2007 hearing. When asked why he didn't plan to marry Ms. Porter after his divorce was final, Mr. Williams responded, "I don't want to go through this hassle again." Mr. Williams testified that Ms. Porter also worked at the post office and that she worked more hours than he did. Under these circumstances, the presumption that Mr. Williams and Ms. Porter are able to share expenses and income is a reasonable one. *Cf.* Tenn. Code Ann. § 36-5-121(f)(2)(B) (creating a rebuttable presumption that the recipient of alimony *in futuro* who lives with a third person is either receiving support from the third person or is contributing to the third person's support). Mr. Williams's statement of income and expenses does not reflect this potential means to decrease expenses and/or increase income. While the above-mentioned presumption is not mandated by statute as it would be if Ms. Williams were living with a third person, it is relevant to a consideration of "[t]he relative earning capacity, obligations, needs, and financial resources of each party, including income from . . . all other sources" under Tenn. Code Ann. § 36-5-121(i)(1).

Under the facts and circumstances presented in this case, we are of the opinion that the evidence does not preponderate against the trial court's award of alimony *in futuro* to Ms. Williams. While the evidence in the record as outlined above supports the notion that Mr. Williams is financially able to pay the amount ordered by the trial court, it does not show that he would be able to pay more, and for this reason Ms. Williams's request for additional alimony is denied.

Additionally, we find Ms. Williams's request for attorney's fees associated with this appeal to be well taken, and it is granted. Courts "customarily award attorney's fees as alimony *in solido* when the economically disadvantaged spouse would otherwise be forced to deplete assets in order

to pay attorney's fees." *Keyt*, 244 S.W.3d at 334. As this court recently noted regarding an award of attorney's fees on appeal:

Whether to award attorney's fees on appeal is a matter within the sole discretion of this Court. *Archer v. Archer*, 907 S.W.2d 412, 419 (Tenn. Ct. App.1995). In making our determination, we must be mindful of "the ability of the requesting party to pay the accrued fees, the requesting party's success in the appeal, whether the requesting party sought the appeal in good faith, and any other equitable factor that need be considered." *Dulin v. Dulin*, No. W2001-02969-COA-R3-CV, 2003 WL 22071454, at *10 (Tenn. Ct. App. Sept. 3, 2003) (citing *Folk v. Folk*, 357 S.W.2d 828, 829 (Tenn.1962)).

Hill v. Hill, No. M2006-02753-COA-R3-CV, 2007 WL 4404097, at *6 (Tenn. Ct. App. M.S., filed Sept. 14, 2007). Considering Ms. Williams's income and health status and the outcome of this appeal, we find it equitable to award her attorney's fees incurred in the defense of this appeal and remand to the trial court for a determination of her reasonable fees in this matter.

IV. Conclusion

The judgment of the trial court is affirmed in its entirety. On remand, the trial court is directed to enter an order granting Ms. Williams a reasonable attorney's fee as further alimony *in solido*. Costs on appeal are assessed to the Appellant, Willard F. Williams.

SHARON G. LEE, JUDGE